A **HOTEL ISTANA KUALA LUMPUR**

v.

JASMAN SAIDUN

B HIGH COURT MALAYA, KUALA LUMPUR
MOHAMAD ARIFF YUSOF J
[JUDICIAL REVIEW NO: R3(1)-25-230-2006]
9 FEBRUARY 2010

C ***ADMINISTRATIVE LAW:*** *Judicial review - Application for - Award of Industrial Court - Ex parte hearing - Sufficient cause warranting departure from technicalities and legal form - Exercise of Industrial Court's discretion - Whether decision of Industrial Court Chairman perverse in law - Industrial Relations Act 1967, s. 30(5)*

D ***LABOUR LAW:*** *Industrial Court - Award - Judicial review - Ex parte hearing - Sufficient cause warranting departure from technicalities and legal form - Exercise of Industrial Court's discretion - Whether decision of Industrial Court Chairman perverse in law - Industrial Relations Act 1967, s. 30(5)*

E

This was an application by the applicant for judicial review to quash the Industrial Court's award deciding – in an *ex parte* hearing – in favour of the respondent/claimant and ordering reinstatement together with the payment of backwages of over five F years. It was not disputed that the applicant failed to attend before the Industrial Court on three previous mention dates, despite notices being sent and being expressly told that its presence on the third mentioned date was compulsory. The only issue requiring consideration was whether the decision of the G Industrial Court Chairman ('Chairman') was perverse or given in error of jurisdiction.

Held (dismissing the application):

H **(1)** The Industrial Court's duty to act according to equity, good conscience and the substantial merits of a case does not mean that it can simply ignore the Industrial Court Rules 1967 ('Rules'). However, if there exists sufficient cause on the facts to warrant a departure from technicalities and legal form, it is I within the Industrial Court's discretion, in exercise of the wide powers under s. 30(5) of the Industrial Relations Act 1967,

to conclude as it did on the facts of this case, namely, to decide to proceed on an *ex parte* basis in view of the Hotel's lackadaisical conduct despite being given ample opportunity and express notice to be present on the three mention dates. On this basis, there had not been any element of illegality, procedural impropriety or irrationality, or even disproportionality, on the part of the Chairman in deciding to proceed *ex parte* with the hearing and to decide as he did to order reinstatement and the payment of backwages effective from the date of dismissal to the date of the award. This was in keeping with the proper exercise of discretion bearing in mind the circumstances of the claim, and the effect the dismissal had on the claimant's employment prospects and his post-dismissal income. The Chairman's decision could not be considered perverse in law. *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [CA] (refd). (paras 7 & 10)

Cases(s) referred to:

Dr A Dutt v. Asunta Hospital [1981] 1 LNS 5 FC ***(refd)***

Josephine Banun Pako v. Hong Leong Bank Bhd [2008] 7 CLJ 699 HC ***(refd)***

Nestle Food Storage (Sabah) Sdn Bhd v. Terrence Tan Nyang Yin [2002] 1 ILR 280 ***(refd)***

R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***

Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd [2010] 3 CLJ 310 CA ***(refd)***

Legislation referred to;

Industrial Court Rules 1967, r. 8(3)

Industrial Relations Act, ss. 29(d), (g), 30(5)

For the appellant - N Sivabalah (Wong Kian Joon with him); M/s Shearn Delamore & Co

For the respondent - Sri Saraswathy Devi (V Alagendra, SS Gabriel & Sunil Vijaya with her); M/s N Saraswathy Devi

Reported by Suresh Nathan

JUDGMENT

Mohamad Ariff Yusof J:

[1] After considering the totality of the record before me, the written submissions of the parties, including the further written submissions highlighting the recent Court of Appeal decision in

Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd [2010] 3 CLJ 310, and the applicable law, I dismiss this application for judicial review by Hotel Istana to quash the Industrial Court Award No. 103/2006 which decided in favour of the respondent/claimant and ordered his reinstatement together with the payment of back wages of over five years.

[2] I have carefully considered the arguments by the applicant against the reasons given by the Industrial Court Chairman in his award, and I find, when viewed as a whole, the decision of the Industrial Court Chairman cannot be regarded as perverse or given in error of the jurisdiction. The hearing before the learned Industrial Court Chairman was no doubt heard *ex parte*, but the applicant has only itself to blame for the attitude that it displayed throughout the proceedings leading to the eventual hearing of the claim. I find that the Industrial Court Chairman, in deciding to proceed *ex parte* at the hearing and after having considered the attitude of the applicant, properly exercised his discretion on the basis of the applicable law. To my mind, the peculiar facts of this case do not establish a failure on the part of the Industrial Court to provide procedural justice and a proper right of hearing, but rather the record establishes that despite the applicant being given the opportunity to be heard, the lackadaisical attitude of the applicant, as represented by its relevant officers (notably its Human Resource Manager), did not heed this opportunity given to it.

[3] It is not disputed that the applicant failed to attend before the Industrial Court on three previous mention dates, despite notices being sent and despite being expressly told that its presence on the third mentioned date was compulsory. I refer in this connection to the letter from the Registrar of Industrial Court to the applicant and the claimant's solicitors dated 17 May 2006 (exh. OC5 to the supporting affidavit of the applicant). This letter categorically states:

> Saya diarah merujuk kepada pertikaian di atas dan memaklumkan bahawa kes ini akan disebut semula pada 31 Mei 2006 ...
>
> Oleh yang demikian, tuan-tuan DIWAJIBKAN hadir dalam sebutan semula kes ini pada tarikh dan masa yang telah ditetapkan di atas tanpa gagal.

[4] Despite this very clear direction, the hotel continued to absent itself. As explained in the award, the Industrial Court Chairman took the position to proceed on the basis of an *ex parte* hearing in the absence of the hotel on the basis of the empowering provisions of s. 29(d) and s. 29(g) of the Industrial Relations Act. The following is recorded in the award:

> Confronted with such a situation the court is of the view that any further attempt to liaise with the company on this case will be an exercise in futility. It will only waste precious time and monetary cost of the Industrial Court.
>
> Therefore it initiated an *ex parte* hearing in the absence of the company even though the case had only been fixed for mention. The empowering provisions of section 29(d) and section 29(g) of the Act 177 laid down that ...

[5] It has to be noted that the applicant was also supplied and served with Form J requiring it to submit a statement in reply. Again, the applicant failed to take any action on it.

[6] I take note of the fact that on the hearing date on 5 June 2006, the date for the applicant to submit the statement of reply had not yet expired. Nevertheless, it is a fact that no statement in reply was ever filed whether on the date or at any time thereafter.

[7] I have considered the effect of r. 8(3) of the Industrial Court Rules on the fixing of dates for hearing. This rule specifies "upon the dates of hearing been fixed, the registrar shall serve notice thereof in Form G". I have also borne in mind what has been stated by the Court of Appeal in the *Hotel Excelsior* case to the effect that the Industrial Court's duty to act according to equity, good conscience and the substantial merits of the case without regard to the technicalities and legal form under s. 30(5), does not give the Industrial Court the *carte blanche* to simply ignore the Industrial Court Rules 1967. Nevertheless, it is also considered by the Court of Appeal that s. 30(5) allows the Industrial Court to disregard technicalities and legal form under the Industrial Court Rules. What the Court of Appeal was addressing in that case was the stringent rules of pleadings, which is not a mere matter of form, but of substance. I read this statement of the Court of Appeal as inferring that the Industrial Court cannot

simply ignore the Industrial Court Rules. However, if there exists sufficient cause on the facts to warrant a departure from technicalities and legal form, such as the service of the required form, it is within the Industrial Court's discretion, in exercise of the wide powers under s. 30(5), to conclude as it did on the facts of this case, namely to decide to proceed on an *ex parte* basis in view of the lackadaisical conduct of hotel despite being given ample opportunity and an express notice to be present on the three mention dates. On this basis I find that there has not been any element of illegality, procedural impropriety or irrationality, or even disproportionality, on the part of the learned Industrial Court Chairman in deciding to proceed *ex parte* in the hearing and to decide as he did to order reinstatement and the payment of back wages effective from the date of dismissal to the date of the award. This is in keeping with the proper exercise of discretion bearing in mind the circumstances of the claim, and the effect the dismissal had on the claimant's employment prospects and his post-dismissal income. I have borne in mind the decisions in *Nestle Food Storage (Sabah) Sdn Bhd v. Terrence Tan Nyang Yin* [2002] 1 ILR 280, *Josephine Banun Pako v. Hong Leong Bank Bhd* [2008] 7 CLJ 699 and *Dr A Dutt v. Asunta Hospital* [1981] 1 LNS 5. I feel it is proper in this case for the award of backwages to reflect a punitive element in view of the lackadaisical conduct of the hotel.

> The basic approach in the award of backwages is that the workman is awarded a sum of backwages arrived at by multiplying his monthly remuneration (the multiplicand) with the number of months between the date of his dismissal and the date of the award (the multiplier). Where reinstatement is ordered the reinstated workman would be entitled to the full backwages unless cogent reasons indicate otherwise. (pg 287 of *Nestle Food Storage*)

[8] The relevance of Practice Note 1 of 1987 was addressed in *Josephine Banun ak Pako v. Hong Leong Bank Bhd*, where the court held this Practice Note could not "tie the hands of the tribunal when the justice of the case warrants not to do so."

[9] In *R. Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147 of the report), it was said the courts should not reverse an award unless there is proven a clear jurisdictional error. One such jurisdictional error can arise when a tribunal of limited jurisdiction, which the Industrial Court is, does not act within the proper scope of its statutory function and reference.

Related to this is the question whether it has acted without sufficient evidence, or on no evidence, or has misconstrued the law on an issue on which its decision is founded.

[10] The decision of the learned Industrial Court Chairman in this case cannot, to my mind, be considered perverse in law. The discretion to proceed to hear *ex parte*, and to award the backwages for five years, was proper and not in excess of jurisdiction. It was properly considered on the basis of the law, in particular the Industrial Court Rules 1967.

[11] Hence, in the full circumstances of the case and for these reasons, I dismiss this application for judicial review with taxed costs, unless agreed, to be paid by the applicant to the respondent.